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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-270

CLAUDE KELLEY, Director of the Department of Conservation, et al., etc.,

Petitioners

vs.

MOBIL OIL CORPORATION, a New York Corporation,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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MOBIL OIL CORPORATION, a New York Corporation,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this case on May 6, 1974.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix "A") is reported at 493 F. 2d 784.

The opinion of the District Court for the Southern District of Alabama (Appendix "B") is reported at 353 F. Supp. 582.

JURISDICTION

The judgment of the Court of Appeals was entered on May 6, 1974. A timely application for rehearing was denied on June 14, 1974. The jurisdiction of this Court is invoked under 28 U. S. C., §1254(1).

QUESTIONS PRESENTED

1. Whether the Eleventh Amendment to the United States Constitution prohibits Federal Courts from exercising pendent jurisdiction over actions on contracts against state officials.

2. Whether a substantial federal question was alleged in the District Court, and hence that Court had pendent jurisdiction over Mobil Oil's nonfederal claim.

3. Whether the District Court applied state law to Mobil Oil's nonfederal claim.

4. Whether when the Court of Appeals characterized the District Court's jurisdiction as pendent without remanding the case for application of state law, Petitioners were denied fairness as litigants.

5. Whether the pervasive principle of federal-state comity was impaired.

CONSTITUTIONAL PROVISIONS INVOLVED

The Eleventh Amendment to the Constitution of the United States provides as follows:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "Nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

Section 14 of the Constitution of Alabama 1901 provides as follows:

> "That the State of Alabama shall never be made a defendant in any court of law or equity."

STATEMENT OF THE CASE

This suit, invoking federal question and diversity jurisdictions, was filed on August 9, 1972, by Mobil Oil Corporation against the Petitioners, the Alabama Department of Conservation and Claude Kelley, Director of the Department of Conservation; William J. Baxley, Attorney General of the State of Alabama; and the Alabama Oil and Gas Board and its members, Drexel Cook, Julian Maddox, Ralph Adams, and Philip E. LaMoreaux. It arises out of four leases of land in Mobile Bay granted to Mobil Oil by the State of Alabama through the Alabama Department of Conservation. The District Court was asked, in the words of the Court,

". . . to extend the period of its lease with the State

> and to enjoin the defendants from failing to issue, or interfering with the issuance of, a valid drilling permit for the leased lands, and generally to grant such other relief as the plaintiff may show they are justly entitled to." Appendix B, p. 24.

The lease extension request was until such time as both the State Oil and Gas Board and the United States Corps of Engineers had issued valid permits for drilling on the leased lands. Petitioners moved to dismiss the complaint for lack of federal question and diversity jurisdictions.

On January 11, 1973, the District Court denied Petitioners' motions to dismiss, rendered an opinion finding that it had federal question jurisdiction, and entered an order granting the lease extensions requested by Mobil Oil.

Petitioners then filed an appeal attacking only the District Court's determination that it had federal question jurisdiction. On May 6, 1974, the Court of Appeals, though observing that the District Court acted upon only a nonfederal question, affirmed the decision of the District Court on the ground that the Court had pendent jurisdiction. Petitioners then filed a timely application for rehearing which was denied on June 14, 1974.

REASONS FOR GRANTING WRIT

I. *THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE MANY DECISIONS OF THIS COURT STATING THAT THE ELEVENTH AMENDMENT BARS ACTIONS ON CONTRACT AGAINST STATE OFFICERS IN FEDERAL COURTS.*

The decision below is in conflict with the decisions of

this Court in *Ex parte Young*, 209 U.S. 123 (1908-; *In re Ayers*, 123 U.S. 443 (1887); *Hans v. Louisiana*, 134 U.S. 1 (1890); and *State of Louisiana ex rel. Elliott v. Jumel*, 107 U.S 711 (1883). These decisions held that the Eleventh Amendment is effective in protecting states in federal court from suits on contracts to which they are parties.

However, the Court of Appeals attempted to circumvent this fundamental protection for states by invoking the rule articulated in *Ex parte Young, supra*, that state officials may be sued in federal courts on the ground that the state statutes under which they are acting are unconstitutional or on the ground that acts of the state officials go beyond federal constitutional bounds, whether or not the constitutionality of a state statute is involved. The Court of Appeals reasoned that since Mobil Oil alleged that Petitioner state officials acted unconstitutionally, the Eleventh Amendment barrier to its claim fell and the District Court was empowered to exercise both its federal question and pendent jurisdictions.

Petitioners respectfully submit that the Court of Appeals misapplied *Ex parte Young*. *Ex parte Young* excluded from its rule actions against state officials on contractual obligations. It specifically distinguished from its rule *In re Ayer, supra*, a case which it interpreted as involving, in reality, an action to compel specific performance by a state on a contract.

The reasons for this exception to the *Ex Parte Young* rule are found at the very heart of the Eleventh Amendment. The primary event leading up to the passage of the Amendment was the Supreme Court's decision in *Chisholm v. Georgia*, 2 U.S. (Dall.) 419 (1973), holding that a state was liable

in an action of assumpsit. In the words of Justice Rehnquist,

> "The decision in that case . . . literally shocked the Nation. Sentiment for passage of a constitutional amendment to override the decision rapidly gained momentum, and five years after *Chisholm* the Eleventh Amendment was ratified by the final State necessary for passage." *Edelman v. Jordan*, 42 U.S.L.W. 4419 at 4422 (U.S. March 25, 1974.)

The principal reason for passage of the Amendment was to protect both the sovereignty of the states and the sanctity of their treasuries; the Amendment provided financial immunity, as well as sovereign immunity. 61 *Georgetown L. R.* 1473 at 1474.

Therefore, actions for award of money from state treasuries and actions on contract are understood as prohibited by the Eleventh Amendment; even *Ex parte Young* did not modify this fundamental prohibition. To this date this Court has refused to interfere, or allow other federal courts to interfere, in state fiscal and contractual matters. For example, on March 25, 1974, in *Edelman v. Jordan*, *supra*, this Court observed through Justice Rehnquist:

> "We do not read *Ex parte Young* or subsequent holdings of this Court to indicate that any form of relief may be awarded against a state officer, no matter how closely it may in practice resemble a money judgment payable out of the state treasury, so long as the relief may be labeled 'equitable' in nature. The Court's opinion in *Ex parte Young* hewed to no such line. Its citation of *Hagood v.*

Southern, 117 U.S. 52 (1886), and *In re Ayers*, 123 U.S. 443 (1887), which were both actions against state officers for specific performance of a contract to which the State was a party, demonstrate that equitable relief may be barred by the Eleventh Amendment." 42 U.S.L.W. at 4423.

This Eleventh Amendment bar to actions of contract against state officials should apply to federal courts exercising pendent jurisdiction, as well as, federal question or diversity jurisdiction, for the thrust of the bar is a broad prohibition on federal courts from interfering in state fiscal and contractual matters.

For these reasons, the Court of Appeals was incorrect in extending the application of *Ex parte Young* to actions on contract against state officials; and it was incorrect in affirming the decision of the District Court construing and extending the leases to which Petitioner state officials were parties.

II. THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH *UNITED MINE WORKERS V. GIBBS*, 383 U.S. 715 (1969).

In *United Mine Workers v. Gibbs*, 383 U.S. 175 (1969), this Court made several fundamental observations about pendent jurisdiction. It stated that a federal court may not exercise pendent jurisdiction over an alleged nonfederal claim unless a *substantial federal claim* is also alleged; it observed that *fairness to litigants* and *federal-state comity* are two basic considerations for federal courts in determining whether to exercise pendent jurisdiction; and it noted that when pendent jurisdiction is exercised, appropriate *state law* should be applied.

A. *Mobil Oil Failed to Allege a Substantial Federal Question.*

Mobil Oil alleged that the failure of Petitioner state officials to extend the leasing agreements violated the due process clause of the Fourteenth Amendment to the United States Constitution. This Court in *Manila Investment Co. v. Trammel*, 239 U.S. 31 (1915), rendered frivolous and insubstantial any claim that the actions of a state or its officers based on contractual agreements violated the due process clause. The issue before this Court was whether in an action for breach of contract to convey lands against the Board of Trustees of Florida State Improvement Funds, plaintiffs presented a real and substantial controversy involving a denial of due process. In concluding that no such constitutional controversy was presented, this Court observed:

> "An examination of the bill shows that the ground of recovery rests upon the allegation that the trustees contracted to convey the lands in question to the complainants, and afterwards, by formal resolution, the board repudiated its former action, and refused to recognize the alleged trust, and declared the complainants' title null and void. Complainants contend that this action by the trustees, as an agency of the State, in repudiation of its former action, and the conveyance of part of the land to others, in violation of the trust, constituted a taking of its property without due process of law, in violation of the provisions of the 14th Amendment. This is the only ground of Federal jurisdiction insisted upon.

> "The case presented no real and substantial controversy involving the construction or effect of the Federal Constitution. The allegations relied upon to give jurisdiction show a breach of contract merely, and bring the case within the principles decided by this court in *St. Paul Gaslight Co. v. St. Paul* 181 U.S. 142, 45 L. Ed. 788, 21 Sup. Ct. Rep. 575 (other cites omitted.)" 239 U.S. at 32 and 33.

Furthermore, *Manila Investment*, together with the many decisions of the Court stating that the Eleventh Amendment bars actions on contract against state officers in federal court, fully dispels any claim that actions on contract brought against state officers involve substantial due process issues. See page 4 of the Petition for a discussion of these Eleventh Amendment cases.

Finally, there are no factual allegations or findings supportive of a federal question. The Court of Appeals observed that though the order of the District Court was not addressed in terms to any state official, it must have been directed to the officials of the Department of Conservation since they were the only state officials who could actually grant the lease extensions — and, of course, as the Court of Appeals noted, the District Court had no jurisdiction over the State of Alabama itself, by virtue of the Eleventh Amendment. The Court of Appeals, therefore, logically concluded that whether there was federal question jurisdiction, and ultimately pendent jurisdiction, of Mobil Oil's claim against the officials of the Conservation Department was the crucial question.

Mobil Oil's complaint is devoid of any specific factual allegations supporting the claim that the Department of Conservation violated any of the rule and forms required by the due process clause; and the opinions of the Courts below are

devoid of any factual findings or even any discussions of alleged facts that would indicate a possible violation of due process. Therefore, there is absolutely no basis in the pleadings or the finding of fact for the federal question jurisdiction assumd by the District Court and for the pendent jurisdiction exercised by it.

B. *Alabama Law Was Not Applied to Mobil Oil's Nonfederal Claim.*

Although the Court of Appeals characterized the jurisdiction of the District Court as pendent, the District Court in its opinion discussed only federal question as the jurisdictional basis for the relief granted; it did not mention pendent jurisdiction. Furthermore, the District Court did not discuss or mention any Alabama law in its opinion. Therefore, it is evident from the opinion of the District Court alone that Alabama law was not applied to Mobil Oil's nonfederal claim.

Petitioners admit that the District Court was presented with briefs on state law, but they discussed only how Alabama law should be applied in a case of diversity jurisdiction, the other jurisdictional ground relied upon by Mobil Oil. The District Court acknowledged, however, that it did not consider the diversity jurisdictional claim and based its opinion solely on federal question, thereby logically implying that it did not consider applying state law either.

Nevertheless, the failure of the District Court to apply to Mobil Oil's claim is clearly evident from a careful consideration of Alabama law. Under Alabama law the doors of the state courts are firmly closed to suits based on state contracts against officials and agencies of the state. This

conclusion is well supported by state law and competent state authorities.

> The Constitution of Alabama 1901, Section 14, states: "That the State of Alabama shall never be made a defendant in any court of law or equity."

It should be noted that Section 14, as interpreted by the Alabama Courts, is broader than the Eleventh Amendment. It wholly withdraws from the state and the legislature, and other state authorities, any power to consent to suit against the state or waive its immunity. *Aland v. Graham*, 287 Ala. 226, 250 So. 2d 677 (1971).

In *Comer v. Bankhead*, 70 Ala. 493 (1881), a complainant sought specific performance of a contract by the warden of the state penitentiary and to enjoin the successor warden from breaching it. The Alabama Supreme Court held the contract to be one by the state as principal and denied relief on Section 14. Similarly, in *Wallace v. Malone*, 279 Ala. 93, 182 So. 2d. 360 (1964), a complainant sought in an action against state officials to enjoin cancellation of a state textbook depository contract. Again, the Alabama Supreme Court held the action was in effect one against the State of Alabama. They remarked:

> "In the instant case we are confronted with a bill, the object of which is by injunction, indirectly to compel the specific performance of a contract of the State, by forbidding all those acts and doings which constitute breach of contract. This may not be done." 279 Ala. at 98, 182 So. 2d at 363.

C. *Petitioners Were Denied Fairness as Litigants.*

Petitioners submit that they were denied fairness as

litigants when Mobil Oil, by merely invoking a federal court's pendent jurisdiction, escaped from state law on a purely state claim and achieved a result different from that possible in state courts. Such substantial variance in the rights and liabilities of litigants depending upon the choice of a forum is hardly desirable in a federal system of courts. See *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), and *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518 at 532 (1928) (Justice Holmes' dissent). Therefore, a minimal requisite for fairness in this case would have been for the Court of Appeals to remand this case to the District Court for application of Alabama law.

D. *The Pervasive Principle of Federal-State Comity was Impaired.*

Federalism embodies:

> "a system in which there is sensitivity to the legitimate interests of both State and National Government, and in which National Government, anxious though it may be to vindicate and protect federal rights and federal interest, always endeavors to do so in ways that will not unduly interfere with legitimate activities of the States." *Younger v. Harris*, 401 U.S. 37 at 44 (1971).

Alabama has legitimate as well as fundamental interests in the adjudication of nonfederal Alabama claims according to Alabama law in Alabama courts. These interests were infringed when Mobil Oil's claim, which was not cognizable in Alabama courts, was adjudicated in federal court as a pendent claim. To the extent that a party is permitted to escape from state law on a nonfederal claim, the greater

will be the friction and resentment between the federal government and the states. These ill effects of Mobil Oil's forum shopping are redolent of the times of *Swift v. Tyson*, 16 U.S. (Pet.) 1 (1842).

CONCLUSION

For these reasons the writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX A

MOBIL OIL CORPORATION, Plaintiff-Appelle,

v.

Claude KELLEY, Director of the Department of Conservation, et al., etc., Defendants-Appellants.

No. 73—1793.

United States Court of Appeals,

Fifth Circuit.

May 6, 1974.

Appealed from the United States District Court for the Southern District of Alabama.

Before BROWN, Chief Judge, GEWIN, Circuit Judge, and RUBIN, District Judge.

ALVIN B. RUBIN, District Judge:

Mobil Oil Corporation invoked federal question and diversity jurisdiction in a suit against the director and members of the Alabama Department of Conservation and the director and members of the Alabama Oil and Gas Board. The district court determined that it had jurisdiction, and decided in favor of Mobil on the merits. The defendants appeal only the trial court's determination that it had jurisdiction. The multiple issues presented by the effort to ascertain the answer to this apparently simple question require detailed analysis. But, to put the conclusion at the beginning, we decide that the district court had jurisdiction.

I. DETERMINATION OF JURISDICTION

[1, 2] Jurisdiction refers to the court's competency to consider a case. In essence, it is authority "to decide a given type of case one way or the other." Hagans v. Lavine, 1974, — U.S. —, 94 S.Ct. 1372, — L.Ed.2d —, 42 L.W. 4381. This is determined at the outset of the suit for reasons that are at least partially practical: the parties, the witnesses, and the public should not be put to the inconvenience and expense of a trial only to be told, after the trial is over, that they were in the wrong courthouse and must go to another for a new trial. Hence the determination whether a suit arises under the Constitution or laws of the United States rests upon "the plaintiff's statement of his own cause of action." Louisville & Nashville R. R. Co. v. Mottley, 1908, 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126. See also Bell v. Hood, 1946, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939; Skelly Oil Co. v. Phillips Petro. Co., 1950, 339 U.S. 667, 70 S.Ct. 876, 94 L.Ed. 1194; Chandler v. O'Bryan, 10 Cir. 1971, 445 F.2d 1045; 1 Barron & Holtzoff, Federal Practice & Procedure § 25 (Wright ed. 1960).

[3] After jurisdiction has been determined to exist on the basis of the allegations of the complaint, the court has the power to decide the dispute between the parties even though the complainant ultimately fails to prove the cause of action on which jurisdiction was originally based. Bell, *supra;* Siler v. Louisville & Nashville R. Co., 1909, 213 U.S. 175, 29 S.Ct. 451, 53 L.Ed. 753. Thus a complaint that alleges the existence of a federal question establishes jurisdiction, even though the court ultimately decides that the plaintiff's federal rights were not violated. Bell v. Hood, *supra;* Hagan v. Lavine, *supra;* Southern Pac. Co. v. Van Hoosear, 9 Cir. 1934, 72 F.2d 903; State of Georgia v Wenger,

7 Cir. 1951, 187 F.2d 285; Moore's Federal Practice 2.06[5].

II. SCOPE OF ELEVENTH AMENDMENT

[4] The State Immunity Amendment, adopted in 1798 as the Eleventh Amendment to the Constitution, prohibits the federal courts from hearing suits against one of the United States by a citizen of another state; it extends a like shield for actions against a state by its own citizens. Hans v. Louisiana, 1890, 134 U.S. 1, 10 S.Ct. 504, 33 L. Ed. 842.

But this buckler has been limited to its exact constitutional width. As early as 1898, a bill to enjoin a state officer from executing an unconstitutional statute was held permissible, Smyth v. Ames, 1898, 169 U.S. 466, 18 S.Ct. 418, 42 L.Ed. 819, because it sought to prevent the officers from acting without authority. If the state statute authorizing the act was unconstitutional, it did no protect the state officer from suit. The action was only against the individual officer, not the state itself; though, as has been pointed out, this construction is anomalous, for the only basis for relief under the Fourteenth Amendment is that the action of the state officer is state action. McGuire v. Sadler, 5 Cir. 1964, 337 F.2d 902; C. Wright, Law of Federal Courts § 48.

[5] It is now rubric that state officials may be sued in federal court on the basis that the state statutes under which they are acting are unconstitutional. Ex Parte Young, 1908, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714; Alabama Pub. Ser. Comm'n v. Southern Ry. Co., 1951, 341

U.S. 341, 71 S.Ct. 762, 95 L.Ed. 1002.[1] By like reasoning the state's immunity has been held not to shelte. state officials from suit when it is claimed that their acts go beyond federal constitutional bounds, whether or not the constitutionality of the state statute is involved. Georgia Railroad & Banking Co. v. Redwine, 1952, 342 U.S. 299, 72 S.Ct. 321, 96 L.Ed. 335. "A valid law may be wrongfully administered by officers of the state, and so as to make such administration an illegal burden and exaction upon the individual." Reagan v. Farmer's Loan & Trust Co., 1894, 154 U.S. 362, 14 S.Ct. 1047, 1051, 38 L.Ed. 1014. See also Alabama Public Service Comm., *supra;* Greene v. Louisville & Interurban R. Co., 1971, 244 U.S. 499, 37 S.Ct. 673, 61 L.Ed. 1280; Williams v. Eaton, 10 Cir. 1971, 143 F.2d 422; Duckworth v. James, 4 Cir. 1959, 267 F.2d 224; Peay v. Cox, 5 Cir. 1951, 190 F.2d 123; Cook v. Davis, 5 Cir. 1949, 178 F.2d 595.

III. THE COMPLAINT

In 1969 Mobil obtained four oil and gas leases on land in Mobile Bay from the Department of Conservation of the State of Alabama. Later it applied unsuccessfully to the State Oil and Gas Board for a permit to drill wells on lands covered by the leases. The complaint alleges that the issuance of such permits had always previously been routine.

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[1] Since the Supreme Court's decisions authorize the type of suit brought here as to Oil and Gas Department officials despite the Eleventh Amendment armor, we do not consider whether, in the jurisprudence of the 65 years since **Ex Parte Young, supra**, was decided, a broader compass is given the effect of the Fourteenth Amendment on the Eleventh. Griffin v. County Sch. Bd. of Prince Edward Co., 1964, 377 U.S. 218, 84 S.Ct. 1226, 12 L.Ed.2d 256; Worchester County Trust Co. v. Riley, 1937, 302 U.S. 292, 58 S.Ct. 185, 82 L.Ed. 268 **(dictum)**; Louisiana St. Bd. of Ed. v. Baker, 5 Cir. 1964, 339 F.2d 911; McCoy v. Louisiana St. Bd. of Ed., 5 Cir. 1964, 332 F.2d 915.

and there was no legal reason for the Director and members not to follow the usual practice.

[6] The complaint, as amended prior to trial, is directed at state officials because, under the Eleventh Amendment, Mobil could not sue the State of Alabama or its agencies. While that part of the complaint focussed on the Oil and Gas Board does not plead a violation of federal constitutional rights in haec verba, it gives adequate notice of the existence of a claim that denial of the permit violated Mobil's rights to due process of law under the Fourteenth Amendment since, in addition to its other allegations, it recites, "Jurisdiction of this Court is invoked pursuant to and in accordance with 28 U.S. Code, Sections 1331 and 1332, and amendment 14, Section 1, to the Constitution of the United States." The notion that the Fourteenth Amendment itself confers jurisdiction is inartful, but the notice thus given is clear. The claim, as pleaded, is substantial, and the complaint was therefore sufficient to confer jurisdiction on the District Court as an action arising under the Constitution of the United States. 28 U.S.C. § 1331. Hagans v. Lavine, *supra*.

Following the general jurisdictional recital, the complaint alleges that ,when Mobil could not obtain a permit to drill from the Oil and Gas Board, it sought an extension of the leases from the State Conservation Department, with no results. It therefore also sued the director and members of the State Conservation Department. But Mobil nowhere alleged that the inaction of these officials violated any of its constitutional rights. Its sole contention with respect to the Conservation Department was, "There exists an actual and bona fide controversy between the parties as to whether the Director of the Department of Conservation is authorized

to toll the running of the primary term of said leases for the time that Mobil as Lessee is precluded by action or inaction of the State or any of its officers or agents from drilling on said leases, and, if he has such authority, whether or not he should grant such extension under the circumstances alleged herein." The relief requested as to the Director of the Department was a decree that he "has the power and right to grant an extension" and an order that he "extend the primary terms of the four leases for the period of time prayed for above, without the requirement of payment of delay rentals or other charges. . . ."

Hence neither the facts alleged nor the claims made suggested a contention that the failure of Conservation Department officials to extend the leases violated its constitutional rights. The defendants promptly challenged the court's jurisdiction alleging its lack generally as well as their contention that this was in effect a suit against the state, hence barred by the State Immunity Amendment.

Whether there was jurisdiction of the claim made against the officials of the Conservation Department, then, is crucial because the sole relief awarded by the District Court was to extend the obligation and payments under the leases until 3 years and 76 days after the Oil and Gas Board shall have issued a valid drilling permit, that being the period of the lease term remaining when the permit was sought; and to extend the terms of the leases until the Oil and Gas Board shall issue a valid drilling permit. The order is not addressed in terms to any state official, but it must be directed to the director and members of the Conservation Department since the Oil and Gas Board could not grant such an extension, and the court clearly had no jurisdiction as to the state itself by virtue of the State Immunity Amendment.

After considering the evidence, the trial court construed the complaint as contending that all of the defendants had taken the plaintiff's property without due process of law, in violation of the Fourteenth Amendment. The court considered that the complaint, thus interpreted, claimed that the officials of the Conservation Department, as well as the officials of the Oil and Gas Board, had denied Mobil due process of law, and that this claim was not wholly insubstantial or frivolous.

We need not dwell on whether the words of the complaint, standing alone, would be a sufficient key to the federal court. The construction given the pleadings by the trial court after hearing the evidence, was not clearly in error. Had the invocation been insufficient, the court could have permitted the allegation of jurisdiction to be amended, as, indeed, this court could now do. 28 U.S.C.A. § 1653. That therapeutic legislation, originally designed to permit belated amendment to allege diversity of citizenship, was extended in the 1948 code revision to permit amendment of all jurisdiction allegations. That the trial court decided that a federal question was alleged should not cause us to reconsider his conclusion merely because we might read the bare words of the complaint differently. Since he could have permitted them to be amended to assert a federal question with precision, we look to whether there was substantial error in his ultimate jurisdictional conclusion.

IV. PENDENT JURISDICTION

[*7-10*] Decision has created an extension to the jurisdiction of federal courts to meet the needs of equity to litigants and judicial economy. Jurisdiction may be based on the assertion of a federal claim but the claimant may be unable to prove his allegations; the evidence may however

prove a basis for relief under state law. In that event, a remedy may be granted by a federal court though a complaint based solely on the state claim would have been beyond the court's competency. Siler, supra; Wright, Federal Courts, § 19; See also Moor v. County of Alameda, 1973, 411 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596. Similarly, where the complaint itself alleges a claim with respect to which federal courts are given jurisdiction and, in addition, a claim based on state law arising out of a common nucleus of operative fact, the federal court may adjudicate both claims in a single proceeding without requiring the parties to present the same facts to two different courts, United Mine Workers v. Gibbs, 1966, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218; Hurn v. Oursler, 1933, 289 U.S. 238, 53 S.Ct. 586, 77 L.Ed. 1148; Connecticut General Life Ins. Co. v. Croton, 5 Cir. 1968, 405 F.2d 41.[2]

"Pendent jurisdiction, in the sense of judicial *power*, exists whenever there is a claim 'arising under [the] Constitution, the laws of the United States, and Treaties

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[2] When jurisdiction is based on diversity of citizenship, the fundamental claim for relief is by definition based on state law. The issue of pendent jurisdiction arises when there is a lack of the requisite jurisdictional amount with respect to the pendent claim, when a case filed in state court is removed to federal court, or when it is sought to join in a pendent claim a new defendant—sometimes one with respect to whom diversity is lacking. Whether or not pendent jurisdiction lies in any of these situations is matter as yet undecided by this circuit. See, generally, Seyler v. Steuben Motors, Inc., 3 Cir. 1972, 462 F.2d 181; Hatridge v. Aetna Cas. & Sur. Co., 3 Cir. 1969, 415 F.2d 809; Stone v. Stone, 4 Cir. 1968, 405 F.2d 94; Campbell v. Triangle Corp., E.D.Pa.1972, 336 F.Supp. 1002; Sherrell v. Mitchell Aero, Inc., E.D.Wis.1971, 340 F.Supp. 219; Robison v. Castello, E.D.La.1971, 331 F.Supp. 667. If pendency of parties is extended to instances where federal jurisdiction is based on diversity, the long-held interpretation of the diversity statute as requiring complete diversity of parties would require reconsideration. See Strawbridge v. Curtis, 1806, 7 U.S. (3 Cranch) 267, 2 L.Ed. 435.

made, or which shall be made, under their authority . . .,' U.S.Const., Art. III, § 2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case.' The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. Levering & Garrigues Co. v. Morrin, 289 U.S. 103 [, 53 S.Ct. 549, 77 L.Ed. 515]. The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole." United Mine Workers v. Gibbs, *supra*, 383 U.S. at 725.

See also Hagans v. Lavine, *supra*,

[*11*] Since a substantial federal claim was stated against the director and members of both the Oil and Gas Board and the Conservation Department, there was pendent jurisdiction of the nonfederal claims on which the case was ultimately decided. We therefore do not need to address the question whether the assertion of federal question jurisdiction as to the officials of the Oil and Gas Board also conferred pendent jurisdiction of the claims against the officials of the Department of Conservation as additional parties.

This type of pendent jurisdiction has been called "pendent party" jurisdiction, to distinguish it from "pendent claim" jurisdiction, where the judicial power embraces only additional claims between the same parties. See Astor-Honor, Inc. v. Grosset & Dunlap, Inc., 2 Cir. 1971, 441 F.2d 627; Leather's Best, Inc. v. S.S. Mormaclynx, 2 Cir. 1971, 451 F.2d 800; Almenares v. Wyman, 2 Cir. 1971, 453 F.2d 1075,

and Professor Jo Desha Lucas' comments in Supplement to Moore's Federal Practice, 18.07 (Supp.1972) and compare Williams v. U.S., 9 Cir. 1969, 405 F.2d 951, and Wojtas v. Village of Niles, 7 Cir. 1964, 334 F.2d 797. See also Shannon v. United States, 5 Cir. 1969, 417 F.2d 256, and Connecticut General Life Insurance Company v. Craton, 5 Cir. 1968, 405 F.2d 41; and Comment (1974) 20 Loyola L.Rev. 176. The Supreme Court recently considered the issue in Moor v. County of Alameda, 1973, 411 U.S. 693, 94 S.Ct. 1785, 36 L.Ed. 596, and, while recognizing a trend in the lower courts "to hear pendent claims involving pendent parties," chose not to decide the question.[3]

Mobil's claims against the officials of the two state departments was inextricably interwoven. They arose out of a common nucleus of operative fact. The trial court exercised its discretion wisely.

For those reasons, we conclude that the complaint as filed conferred federal question and consequent pendent jurisdiction over the director and members of the Oil and Gas Board and over the director and members of the Conservation Department.[4] The judgment of the district court is therefore affirmed.

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[3] "Whether there exists judicial power to hear the state law claims against the County is, in short, a subtle and complex question with far reaching implications. But we do not consider it appropriate to resolve this difficult issue in the present case, for we have concluded that even assuming **arguendo** the existence of power to hear the claim, the District Court, in exercise of its legitimate discretion, properly declined to join the claims against the County in these suits." Moor v. County of Alameda, 1973, 411 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596.

[4] The invocation of diversity jurisdiction was therefore unnecessary. We do not mean by mentioning that plaintiff relied upon diversity of citizenship, to imply that this was appropriate. See, e. g. Ohio v. Wyandotte Chemicals Corp., 1971, 401 U.S. 493, 91 S.Ct. 1005, 28 L.Ed.2d 256; Harris v. Pennsylvania Turnpike Comm., 3 Cir. 1969, 410 F. 2d 1332.

APPENDIX B

MOBIL OIL CORPORATION, a New York Corporation, Plaintiff,

v.

Claude KELLEY, Director of the Department of Conservation, et al., Defendants.

Civ. A. No. 7277-72-P.

United States District Court, S. D. Alabama, S. D. Jan. 11, 1973.

JUDGMENT AND DECREE

PITTMAN, Chief Judge.

This suit was filed by Mobil Oil Corporation, as lessee from the State of Alabama of the oil and gas rights to certain parcels of land located in Mobile Bay, Alabama, seeking declaratory and injunctive relief. The defendants are the Alabama Department of Conservation and its Director, Claude Kelley, in his official capacity, the State Oil and Gas Board and its members, in their official capacities, the State Oil and Gas Board Supervisor, Philip E. LaMoreaux, in his official capacity, and the Attorney General for the State of Alabama, William J. Baxley, in his official capacity.

Specifically, plaintiff desires the court to extend the period of its lease with the State and to enjoin the defendants from failing to issue, or interfering with the issuance of, a

valid drilling permit for the leased lands, and generally to grant such other relief as the plaintiff may show they are justly entitled to.

[1] Jursidiction is alleged in this court pursuant to 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1332 (diversity of citizenship), and Amendment Fourteen, Section 1, United States Constitution (deprivation of property without due process). Since defendants have challenged the jurisdiction of the court on both federal question and diversity of citizenship grounds, the issue of jurisdiction is the first which must be resolved.

Any discussion of federal question jurisdiction under 28 U.S.C. § 1331 must necessarily begin with the Supreme Court's pronouncements in Bell v. Hood, 327 U.S. 678, 681, 66 S.Ct. 773, 90 L.Ed. 939, 943 (1946):

> . . . where the complaint . . . is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court, but for two possible exceptions later noted, must entertain the suit.
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> * * * * * * * * *
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> The previously carved out exceptions are that a suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.

C. Wright, Federal Courts (1963), at page 55, states more succinctly, but no less emphatically, that "[D]ismissal for want of jursidiction is appropriate only where the fed-

eral claim is frivolous or a mere matter of form." (footnote omitted)

The complaint in this instance alleges that plaintiff's property has been taken without due process of law in contravention of Amendment Fourteen, Section 1 to the Constitution of the United States. It is claimed that the issuance of drilling permits was a routine administrative matter when Mobil entered into the leases and subsequent failure to issue the permit has deprived the plaintiff of the use of the property which was in the contemplation of the parties at the time of the bargaining.

Numerous courts through the years have sustained federal question jurisdiction in actions to enjoin the enforcement of conservation laws and orders of state agencies dealing with the production of oil and the classification of oil wells. *See*, Railroad Commission v. Rowan & N. Oil Co., 310 U.S. 573, 60 S.Ct. 1021, 84 L.Ed. 1368 (1940); Henderson Co. v. Thompson, 12 F.Supp. 519 (D.C.Tex. 1935); Amazon Petroleum Corp. v. Railroad Comm., 5 F.Supp, 633 (E.D.Tex. 1934). Representative of the decisions in these cases and closer to the fact situation at bar are the opinions of Whittington v. Smith, 16 F.Supp. 448 (E.D.Tex.1936) and Lindsley v. Natural Carbonic Gas Co., 162 F. 954 (C.C.S.D.N.Y. 1908). In *Whittington, supra*, the district court ruled that federal question jurisdiction was present in a suit challenging a denial of a drilling permit to the owner of already producing land under a newly propagated state conservation law. The Second Circuit likewise upheld jurisdiction in a suit by the producer of carbonic gas which challenged a state conservation law. The law prevented the plaintiff from pumping the gas in the manner in which he was then currently engaged. Lindsley v. Natural Carbonic Gas, *supra*.

There are other cases which are factually similar to that presently before the court. Justice Brandeis, in Herkness v. Irion, 278 U.S. 92, 49 S.Ct. 40, 73 L.Ed. 198 (1928), found that the district court had jurisdiction in a suit questioning the validity under the Fourteenth Amendment, of an order of an administrative board of the state. The plaintiff, a manufacturer of carbon black from natural gas, was denied a permit on the sole ground of the policy recently announced by the Commissioner of Conservation not to issue any new permits and to gradually reduce those already outstanding. Before the new policy decree, it had been the custom to routinely issue the permits. Jurisdiction was affirmed in Merced Dredging Co. v. Merced County, 67 F.Supp. 598 (S.D.Cal. 1946) for a property owner's challenge of a newly enacted county ordinance which prohibited him from dredging on his land without a permit and dictated the manner in which any dredging was to be done.

A reading of these decisions amply demonstrates that plaintiff's claim is not "wholly insubstantial or frivolous" or made "solely for the purpose of obtaining . . . jurisdiction." This conclusion having been reached, the question need not to be reached as to whether jurisdiction also exists under 28 U.S.C § 1332.

FINDINGS OF FACT

Mobil Oil Corporation is a New York corporation with its principal place of business being located in New York and is qualified to do business in the State of Alabama. The defendants Claude Kelley, William J. Baxley, Drexel Cook, Julian Maddox, Ralph Adams, and Philip E. LaMoreaux, are each over the age of 21 years of age and are citizens of the State of Alabama. Claude Kelley is the Director of the

Department of Conservation of the State of Alabama. William J. Baxley is the Attorney General of the State of Alabama, the chief legal officer for the State. Drexel Cook is Chairman and member of the State Oil and Gas Board of Alabama, Julian Maddox and Ralph Adams are members of the State Oil and Gas Board of Alabama, and Philip E. LaMoreaux is the State Oil and Gas Board Supervisor.

A hearing was held, evidence taken, arguments made and briefs submitted, and all parties have submitted on the complaint as last amended as to the merits of the case together with the injunctive relief sought.

In September, 1969, the Director of the Department of Conservation of the State of Alabama advertised for bids on leases on approximately 20,000 acres of water bottom property in Mobile Bay. Mobil was the highest bidder for these leases. On October 24, 1969, Mobil entered into oil and gas leases numbers 347, 348, 349, and 350 with the State of Alabama through the Department of Conservation for the purpose of oil and gas exploration in certain acreages of Mobile Bay. Each of the leases was duly executed by the Director of the Department of Conservation, approved by the Governor of the State of Alabama, and attested by the Secretary of State, all as required by Alabama statutory law. Each lease was for a five year term and as long thereafter as there was production of oil or gas from that lease. Drilling must be completed, however, within a two year period after the end of the primary term.

Mobil paid $78,822.00 as lease bonuses for the four leases and paid, on or before October 24th of 1970 and of 1971, $10,695.00 as delay rentals for each year as required by the terms of the leases. Mobil has also spent in excess

of $139,000.00 in evaluating the land covered by the leases as well as considerable inter-company time and expense.

The lease specifically granted to Mobil the right to drill on the property covered by the leases during the term of the leases.

On July 9, 1970, Mobil filed an application with the State Oil and Gas Board of Alabama for a permit to drill a well at a location in Mobile Bay covered by one of the said four leases. Up until the time of the filing of this application, such permits had been issued routinely by the Oil and Gas Board when the applicant qualified under the rules and regulations. At least two wells had previously been permitted and drilled in Mobile Bay prior to Mobil having made its application. Mobil's application has not been questioned.

Mobil requested a drilling permit from the U.S. Corps of Engineers as required by federal law, on July 17, 1970. No permit has been issued by either the Oil and Gas Board or the U. S. Corps of Engineers.

Mobil has requested the defendant Kelley, as the Director of the Department of Conservation, to grant extensions on the leases but was informed that he had no authority to do so.

Mobil has cooperated with the Oil and Gas Board and a committee suggested by the then Governor of Alabama to work on new rules and regulations to govern off shore drilling in Alabama waters. Up until the time of the hearing in this cause, the Oil and Gas Board has not adopted new rules and regulations for off shore drilling and had not issued Mobil a permit to drill.

Mobil has desired to drill a test well and has stood ready to proceed with such drilling since their application to drill was first made on July 9, 1970.

The defendant Baxley, as Attorney General, is the attorney for the Director of the Department of Conservation and for the Oil and Gas Board of Alabama. He has advised the Oil and Gas Board that he objects to the issuance of the requested drilling permit to Mobil and has also filed formal objections with the U. S. Corps of Engineers to its issuing a drilling permit to Mobil. The defendant Baxley has publicly announced that he is opposed to the drilling in Mobile Bay and he will fight it. He has not acted fraudulently or in bad faith, nor has he abused the discretion of his office.

The leases which are the subject of the litigation according to the terms therein, may be kept in force by the payment of delay rentals until October 24, 1974.

CONCLUSIONS OF LAW

[2] It is clear from the history of the Department of Conservation's issuance of permits under its oil and gas leases and from the content of the oil and gas leases in question, that it was contemplated by the parties at the time the subject leases were made that Mobil would have the right to drill. It would indeed be a strained construction of the lease arrangements to arrive at a conclusion which would in effect hold that the plaintiff received, and the defendant State Department of Conservation gave no more than a lottery ticket, a chance, for the right to drill for oil and gas.

In reliance on these leases, Mobil has expended large sums of money, has pursued all avenues of relief available

to it and has fulfilled its obligations under the lease. Since Mobil has been deprived of the right contemplated by the lease agreement, it is the opinion of this court that, as a matter of equity, and to prevent unjust enrichment of the State, Mobil is entitled to have the terms of the lease stayed for the period which it is delayed in obtaining drilling permits by reason of the actions, or inaction of the Oil and Gas Board of the State of Alabama.

[*3, 4*] The Attorney General of the State of Alabama has not unreasonably nor unlawfully interfered with the activities of the State Oil and Gas Board or the U. S. Corps of Engineers. He has wide discretion in determining what actions he should take in protecting what he conceives to be the best interest of the State of Alabama and the citizens thereof. The actions taken by him in the case at hand were an exercise of that discretion and in fulfillment of the duties of the office. An injunction is not warranted to prohibit him from taking action to prevent the issuing of the drilling permits requested by Mobil.

ORDER

It is therefore ordered, adjudged, and decreed that the leases, to wit, numbers 347, 348, 349, and 350, and the obligations and payments due thereunder should be, and from this date are hereby stayed until three (3) years and seventy-six (76) days after the Oil and Gas Board has issued a valid drilling permit.

It is further ordered, adjudged, and decreed that the terms of the leases, to wit, numbers 347, 348, 349, and 350, are extended by staying the running of the primary terms set out in each lease from August 9, 1970, until the date

the Oil and Gas Board issues a valid drilling permit and an additional two (2) years after the primary term if there is drilling.

The court retains jurisdiction of this cause and on petition of any party or by the court ex mero motu this cause may be set down for another hearing to fashion other and different relief in order to do justice between the parties according to law and equity.

Costs are taxed against the defendant Department of Conservation, State of Alabama.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 73-1793

MOBIL OIL CORPORATION,
Plaintiff- Appellee,

versus

CLAUDE KELLEY, Director of the Department of Conservation, ET AL, Etc.,
Defendants—Appellants.

Appeal from the United States District Court for the Southern District of Alabama

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ON PETITION FOR REHEARING
(June 14, 1974)

Before BROWN, Chief Judge, GEWIN, Circuit Judge and RUBIN, District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.